The rule and distinction are clearly stated in 2 Devlin on Real Estate, §§ 979, 980. So also Bouvier's Law Dictionary defines "exception" as:

"The exclusion of something from the effect or operation of the deed or contract which would otherwise be included."

On the other hand, "reservation" is defined as:

"That part of a deed or instrument which reserves a thing not in esse at the time of the grant, but now created."

These authorities lead to the conclusion that the language of the clause upon the correct interpretation of which this case rests creates an exception, and not a reservation, and vests no interest, present or future, in the lot in controversy in Mitchell and those claiming under him.

Editor's Note.—This very interesting and instructive case, in which Judge Whittle dissents on the ground that "the decision overturns a long established and important canon of construction in the law of conveyancing in this commonwealth, the tendency of which is to create confusion and unsettle titles to real property," is the subject of an editorial in this issue of the REGISTER, by R. T. W. Duke, Jr., Editor-in-Chief.

CRAIG v. CRAIG.

Jan. 13, 1915. Rehearing Denied Feb. 2, 1916.

[87 S. E. 727.]

1. **Divorce (§ 108*)—Proceedings—Evidence—Record in Prior Suit.**—In a wife's suit for divorce, where the husband relied upon the plea of res judicata on account of a judgment in his own prior suit, the admission in evidence of all of the testimony in the record in the prior suit was proper, as it was necessary to examine the entire record in the original suit in order to determine whether the plea afforded a defense.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 349-352; Dec. 108.*]

2. **Divorce (§ 172*)—Judgment—Res Judicata.**—In a husband's suit for divorce, met by the wife's cross-bill charging desertion and cruelty, where she failed to introduce evidence to establish her charges, the court was justified in saying that the evidence was insufficient to enable it to pass upon the issues raised by the cross-bill, and its decree, continuing, "and that therefore the allegations in the cross-bill have not been proved so as to entitle the defendant to affirmative relief thereon," was a complete adjudication, conclusive in the wife's subsequent suit, of all the issues which were raised or

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

might have been raised upon all the evidence which had been introduced or might have been introduced in support of the allegations of the cross-bill.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 559-561; Dec. Dig. § 172.*]

3. Divorce (§ 110*)—Proceedings—Evidence—Desertion.—Where a husband deserted his wife February 12, 1912, against her protest, but his suit for divorce was not instituted until May 20, 1912, so that his desertion continued for more than three months before pendency of his suit, in support of her cross-bill charging cruelty and desertion, it was competent for the wife to introduce evidence to show the consummated act of desertion, despite the rule that separation of a husband from his wife during the pendency of his suit for divorce does not constitute a desertion.

[Ed. Note—For other case, see Divorce, Cent. Dig. § 388; Dec. Dig. § 119.*]

4. Divorce (§ 172*)—Judgment—Character of Decree.—In a husband's suit for divorce, met by the wife's cross-bill charging cruelty and desertion, where, on the day after final decree was entered, the wife's counsel appeared and asked the court to allow the cross-bill to remain on the docket, first, to give the husband opportunity to return and resume marital relations, or, second, to give the wife opportunity to take further evidence in support of her cross-bill, if the husband refused to return, whereupon the court certified that the wife did so move the court before the final decree, and that the court overruled the motion, the fact was conclusive on the claim, made in the wife's subsequent suit for divorce, that the decree in the husband's suit was not a final adjudication.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 559-561; Dec. Dig. § 172.*]

5. Divorce (§ 172*)—Decree—Res Judicata.—The decree for a husband, who had been convicted of felony and appealed, rendered for him in his wife's action for divorce on account of the conviction, because the suit was prematurely brought, was not a final adjudication of the wife's right to a divorce for the conviction, and did not estop her from maintaining another action on the same ground after the judgment of conviction was affirmed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 559-561; Dec. Dig. § 172.*]

Appeal from Law and Equity Court of City of Richmond.

Suit for divorce by Lottie H. Craig against J. Willard Craig. From a decree dismissing her bill, plaintiff appeals. Affirmed.

See, also, 115 Va. 764, 80 S. E. 507; 87 S. E. 731.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Smith & Gordon, of Richmond, for appellant.

S. S. P. Patteson, of Richmond, for appellee.

KEITH, P. On the 20th of May, 1912, J. W. Craig filed his bill against his wife, Lottie H. Craig, charging her with adultery, and praying for a divorce from the bonds of matrimony. This cause was removed to the law and equity court of the city of Richmond, and on June 18, 1912, the defendant filed her answer, which she prayed might be treated as a cross-bill, in which she denied that she had been guilty of adultery, and made the charge against the plaintiff of cruelty and desertion, and asked that she be granted a divorce from bed and board.

Evidence was taken by the plaintiff and the defendant, and the cause came on to be heard on the 7th of February, 1913, when a decree was entered bringing the cause on to be heard upon the plaintiff's bill and exhibits therewith, the defendant's answer and cross-bill filed by leave of court, and the plaintiff's general replication to said answer, on the plaintiff's answer to the defendant's cross-bill, filed by like leave, and exhibits therewith, and the defendant's general replication thereto, and on the depositions of a number of witnesses named in the decree; and—"the court being of the opinion that the evidence is not sufficient to sustain the charge of adultery against the defendant contained in the plaintiff's bill, it is adjudged, ordered, and decreed that the plaintiff's bill be and the same is hereby dismissed; and the court being further of opinion that the evidence is insufficient to enable the court to pass upon the issues raised by the cross-bill filed by the defendant and the answer of plaintiff thereto, and that therefore the allegations in the cross-bill have not been proved, so as to entitle the defendant to affirmative relief thereon, it is ordered that the cross-bill of the defendant be dismissed."

On the next day, the 8th of February, 1913, Lottie H. Craig, the wife, moved the court to note, as part of the record, that before the entry of the final decree of February 7, 1913, she moved the court to allow her cross-bill to remain on the docket, for the purpose (1) of giving the plaintiff, J. Willard Craig, the opportunity to return to and resume his marital relations with her, if he would; or (2) of giving her the opportunity of taking further evidence in support of her cross-bill, if her said husband refused to return to and resume his marital relations with her.

"On consideration whereof, the court doth certify that said Lottie H. Craig did so move the court before the entry of said final decree, which said motion the court overruled; and those facts are hereby made a part of the record in this cause. And counsel for said Lottie H. Craig having moved the court for a further allowance on account of services and disbursements for

costs in this suit up to this time, it is ordered that said motion as to counsel fees and suit money be docketed and continued."

To that decree an appeal was allowed upon the petition of J. W. Craig, and upon the hearing this court held:

"The evidence is not of a character that we care to discuss. No good purpose would be subserved by its discussion, and we shall, therefore, content ourselves with saying that, after careful consideration of the evidence, we are of opinion that there is no error in the decree of the law and equity court.

"Counsel for appellee have asked that an allowance for counsel fees be made for services rendered in this court. This we decline to do, being of opinion that the trial court is in a better position to inquire into and do what is right and just between the parties in the first instance than this court. We shall therefore affirm the decree and remand the cause, but with leave to counsel for appellee to prosecute their claim for compensation before the law and equity court in the first instance, with the right of appeal to this court if a proper case shall be made for its exercise." Craig *v.* Craig, 115 Va. 764, 80 S. E. 507.

A decree was thereupon entered on January 15, 1914, in this court in conformity with the opinion, and the cause was remanded to the law and equity court to be further proceeded in.

On the third Monday in March, 1914, Lottie H. Craig filed her bill in the law and equity court of the city of Richmond, in which she sets out her marriage with J. Willard Craig in December, 1897, and that her husband willfully left and abandoned his home and her on or about Monday, February 12, 1912; that he filed his bill, praying for a divorce from the bonds of matrimony and charging her with adultery on May 20, 1912; that she filed her answer and cross-bill, charging her husband with desertion, and after evidence had been taken in support and denial of the bill the cause was heard and the bill dismissed, and with it was also dismissed the cross-bill filed by her, for the expressly stated reason that the evidence was insufficient to enable the court to pass upon the issues raised; that as a matter of fact, however, as her bill states, no evidence whatever was taken in support of the cross-bill; that an appeal was allowed to this decree, and on appeal the decree was affirmed in its entirety; that after the final determination of the cause on the bill, and its affirmance by the Supreme Court of Appeals, she addressed a letter to her husband, asking him if he would not now return to her, his home, and his child; that this letter was received by him, but no reply was ever made to it. She then goes on to state her pecuniary condition, the details of which are not material to this discussion, and concludes by asking for a divorce from bed and board by reason of her husband's willful desertion and abandonment of her, and that

she be awarded the care and custody of her child; that her husband be required to pay her periodically a sufficient sum of money as temporary alimony to support her and her child; that he be also required to pay counsel fees and a sufficient sum for suit money to take depositions; that permanent alimony be awarded her; and that all such other, further, and general relief be granted her as the nature of her case requires.

To this bill the husband filed his answer, and pleaded that:

"All the matters set up in the bill have been litigated heretofore in the law and equity court and the Supreme Court of Appeals of Virginia, between the same parties, as will appear from the printed record in said suit and proceedings herewith filed, the mandate of the Supreme Court of Appeals and also the final decree of this court in said cause."

Defendant pleaded that these proceedings constitute a legal bar to this suit as the record, mandate, and decree show that all of the matters and things now set up as a ground for divorce have been heretofore adjudicated and without waiving the plea the defendant further answered denying all the allegations of plaintiff's bill and reiterating certain facts which are also stated in the original record in justification of his separation from his wife.

Depositions were taken and the plaintiff proved that she had sought a reconciliation with her husband since entry of the decree in the original suit, which had been denied by him; and her suit coming on to be heard on the papers formerly read, which included the record in the original case, upon the evidence of witnesses heard ore tenus by the court, and the plea and answer of the defendant, "the court, being of opinion on all the pleadings and evidence that the plaintiff is not entitled to the relief prayed for by her, doth adjudge, order, and decree that the plaintiff's bill was dismissed." Thereupon an appeal was allowed to this court.

[1] The first assignment of error is that the court erred in ruling that all of the testimony in the record in the original suit should be admitted in evidence and considered by the court in this case.

We do not think there is any merit in this contention. The appellee in this suit relied upon the plea of res adjudicata, and in order to determine whether that plea afforded a defense to the suit it was necessary to examine the entire record in the original suit, not only for the purpose, as we think, of determining the precise matters adjudged in the original suit, but also to enable the court properly to determine whether under all the facts and circumstances of the case the husband should have accepted the wife's invitation to return and renew his cohabitation with her, or, on the other hand whether the charges and proof upon the bill and the cross-bill in the original suit did not disclose a situa-

tion which rendered association between the husband and the wife wholly impossible.

[2] The second assignment of error is that the court erred in dismissing the bill and not giving the complainant the relief prayed for by her, namely, a decree for divorce and alimony for the desertion of her husband.

As we have seen the plea of res adjudicata was relied upon by the defendant and sustained by the decree of the court from which this appeal was taken. The first question raised by the petition upon the plea of res adjudicata is that the record and decree relied upon in proof of the plea was not a decree upon the merits as to the cross-bill at all, but was substantially a decree of dismissal without prejudice.

The answer of the wife, which was treated as a cross-bill, charges desertion and cruelty, and, leaving out of view for the present the contention of counsel for the appellant that she could not have introduced evidence of abandonment pending the continuance of the suit charging her with adultery, she was free to produce all evidence within her reach to establish the charges which she had made. She was not ony free to do this, but she will be held to have done so, and failing to introduce evidence the court was justified in saying that the evidence was insufficient to enable the court to pass upon the issues raised by the cross-bill, which, if it had stopped there, might have left some doubt as to whether the court meant to adjudicate the merits of the controversy, or whether it meant to say, by the use of the phrase that "the evidence is insufficient to enable the court to pass upon the issues" raised by the cross-bill, that it did not take them into consideration; but the decree does not stop there. It continues:

"And that therefore the allegations in the cross-bill have not been proved so as to entitle the defendant to affirmative relief thereon."

That is a complete adjudication of all the issues which were raised or might have been raised upon all the evidence which had been introduced or might have been introduced in support of the allegations of the cross-bill.

In Diamond State Iron Co. *v.* Rarig, 93 Va. 595, 25 S. E. 894, this court held, treating of the plea of res adjudicata, that:

It applies, "except in special cases, not only to" all matters actually adjudicated on the former hearing, "but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

In the opinion Henderson *v.* Henderson, 3 Hare, 115, 25 Eng. Ch. R., is cited as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation, in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

And further on in the opinion Judge Cardwell says:

"The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation."

Then follows the citation of numerous cases from this court in support of the position.

The principal objection urged to the plea of res adjudicata is that the cross-bill of the wife, which charges cruelty and abandonment on the part of the husband, was premature; that no proof could have been made of intent to desert in the mind of the husband until his bill for divorce, which charged her with adultery, had been dismissed; and that as the cross-bill was dismissed at the same time there was not an instant of time up to the dismissal of the suit when it could have been shown that her husband was a deserter; that it was a premature charge, which could not have been proved, for up to the dismissal of his bill he not only might have separated himself from his wife and home without being in any legal default, but he must have done so if he wished to maintain his suit.

In support of this position section 1757 of 1 Bishop on Marriage, Divorce & Separation is relied upon, which is as follows:

"One carrying on a suit for any form of divorce cannot be cohabiting with the defendant, for thus he would condone the offense, or affirm the marriage sought to be set aside, or otherwise contravene in pais his act in court. Necessarily, therefore, a withdrawal from cohabitation during such time is not desertion."

Speaking on this subject, Sir John Nicholl said:

"During the pendency of that suit cohabitation was not only not incumbent by law on the parties or on either of them, it would even have been legally censurable, at least in the husband."

So, in Doyle *v.* Doyle, 26 Mo. 545, it was held that separation of a husband from his wife during the pendency of a suit by him for divorce does not constitute an abandonment within the meaning of section 9 of the act concerning divorce and alimony; it would not—the husband failing to obtain a divorce—authorize a decree for alimony.

[3] We accept the law as there stated without question, but we do not think it applies to the case in hand. The bill in the present case states that complainant's husband deserted her on the 12th of February, 1912, against her protest and entreaty. His suit for divorce was not instituted until the 20th of May, 1912, so that his desertion continued for more than three months, during which time his suit for divorce on the ground of adultery had not been instituted and was not pending. It was entirely competent for her, therefore, to introduce any evidence which she may have possessed to show the consummated act of desertion. It cannot be that the complainant, having a complete cause of action against her husband for a desertion which occurred in February, could have her right to relief suspended by reason of the fact that in May he filed a bill falsely charging her with adultery.

[4] But, further, the final decree in the original suit was entered on the 7th day of February, 1913. On the 8th day of February her counsel appeared and asked the court to allow the cross-bill to remain on the docket for the purpose, first, of giving the husband opportunity to return to and resume his marital relations with her; or, second, of giving her the opportunity of taking further evidence in support of her cross-bill, if her husband refused to return to her and resume his marital relations. Thereupon the court certified that she did so move the court before the entry of the final decree, and that the court overruled the motion, which seems to be conclusive upon the claim made that the decree was not a final adjudication of the controversy.

[5] In support of the contention that the charges of cruelty and desertion in the cross-bill of the wife in the original suit were a premature assertion of her rights, the case of Rivers *v.* Rivers, 65 Iowa, 568, 22 N. W. 679, is cited, which holds that where a defendant was convicted of felony and appealed, but pending the appeal plaintiff began an action against him for divorce on account of such conviction, a decree was properly rendered for the defendant because such action was premature so long as the conviction was not final; but such decree was not a final adjudication of plaintiff's right to a divorce for the cause alleged, and did not estop her from maintaining another action on the same ground after the judgment of conviction was affirmed. We have no criticism to make of that case, which was without doubt properly decided, but we fail to see that it has any sort of bearing upon the controversy before us.

We are of opinion that there was no error in the decree complained of, which is affirmed.

Affirmed.

CARDWELL, J., absent.

Editors Note.—The presumption is that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim rights parted with upon the mere pretense that at the time of parting with it he was ignorant of the law acting upon such right. Ignorance of the law does not affect agreements nor excuse from the legal consequences of particular acts. Thus, in the divorce suit of Throckmorton *v.* Throckmorton, 86 Va. 768, the question as to property rights of a wife was raised and by the decree in that case they were disposed of by a decree of absolute divorce, without stating the property rights, and the rights of the parties were left where they were at the date of the decree. When the court fails to make such decree as was done in that case, then the parties must, as to the property, stand upon their legal rights, as they may be affected by the dissolution of the marriage. As these rights certainly might have been disposed of in such divorce suit, the matter was res adjudicata. It is true that in the divorce proceedings preceding the institution of the principal case the right of the wife to prove the desertion prior to the husband's bill for divorce was not raised in the trial court, but that does not at all affect the finality or conclusiveness of the decree which was entered. In other words, the matter is res adjudicata; the decree of the court being a final determination between the parties and their privies of all questions which were, or might have been raised. In Price *v.* Campbell, 5 Call (Va.) 115, it was held that the law in such cases supposes everything contained in the record to have been decided on, and that a contrary doctrine would violate the wisely established rule that interest rei publicae res judicatas non rescindi. It may be that the circumstances fairly illustrate the harshness of the rule, but taken as a whole the doctrine seems to be justly founded upon the familiar maxim in our jurisprudence that no person shall be twice vexed for one and the same cause. The case of Hairston *v.* Hairston, 84 S. E. 15, 20 Va. Law Register 925, is an interesting and instructive case upon this subject. The annotation to that case takes up the question as to the effect of a decree dismissing a bill for divorce as res adjudicata.

There seems to be no doubt that the complainant in the principal case had a complete cause of action against her husband for a desertion which occurred prior to the time that he filed his bill in the prior proceedings, falsely charging her with adultery; therefore it was entirely competent for her to have introduced any evidence which she might have had possession of to show the consummated act of desertion as alleged in her cross-bill. The hardship worked on complainant in this case may be great, but the confusion, inconvenience and general uncertainty which would follow from any other decision would be so great as to make the settlement of such cases uncertain and interminable. Therefore the mere fact that such party was ignorant of her legal rights cannot be permitted to violate and override the wise and well-established rule of res adjudicata.

R. C. W.